Supreme Court, U.S.
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NO. 91-1603

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

SAVE BARTON CREEK ASSOCIATION, INC., WE CARE AUSTIN, and AUSTIN CROSSROADS, INC.,
Petitioners,

V.

FEDERAL HIGHWAY ADMINISTRATION (FHWA), TEXAS DEPARTMENT OF TRANSPORTATION, and MOPAC SOUTH TRANSPORTATION CORPORATION,
Respondents.

RESPONSE OF THE TEXAS DEPARTMENT OF TRANSPORTATION TO THE APPLICATION OF PETITIONERS FOR WRIT OF CERTIORARI

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Questions Presented for Review

(1) Did the Fifth Circuit Court of Appeals correctly determine that the projects in issue were not "proposals for major federal action" and not within the scope of federal NEPA requirements.

(2) Is the Fifth Circuit Court of Appeal's finding that no "proposal for major federal action" an ultimate fact limited by the "clearly erroneous" rule of Rule 52(a) in view of the extensive stipulations of fact found in the record.

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Concise Statement of the Jurisdictional Grounds

The judgment of the court of appeals was entered on *January 17*, 1992. A petition for rehearing was denied on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Statutory and Regulatory Provisions Germane to the Case

23 U.S.C. 145 provides in whole as follows:

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

Rule 52(a), Fed.R.Civ.Proc.(1991)

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necsssary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions or motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

(b) **Amendment.** * * *

A Concise Statement of the Case

The statement of this case is best recited by the Fifth Circuit Court of Appeals at 950 F.2d at pp. 1130-1132. Petitioners' Appendix ("Pet.App") 2-6. This Respondent relies upon the appellate court's recitation of the factual context of this matter now before this Honorable Court.

This case grew out of an attempt by Petitioners to impress upon a State project federal law which, by the rules enunciated by the courts of this land, was not applicable.

The trial court, believing as it did, that the word "proposal" incorporated within its meaning planning and minimal contacts with FHWA, enjoined the project by reasoning that "the probability of a request for federal funding is too great to allow SDHPT to construct one portion of the loop without following federal law". The Court of Appeals found that even this legal reasoning by the trial court was flawed. Pet. App. 17.

This case is very fact-intensive revealing those matters involved in this lawsuit which, basically, are not really in dispute. The erroneous conclusions of law that were drawn from those facts by the trial court materialized the very foundation of the appellate court's resolution of this matter and now are disp ositive of the Petitioner's Application for Certiorari. The Petitioners, who were Plaintiffs in the trial court, stipulated to in excess of 250 stipulations of fact which in large part constituted the whole of the evidence in this matter. There were at least 267 exhibits entered into evidence and listed in the pretrial order before the trial court. Pet. App. 4. The witnesses contradicted none of the stipulations of fact or the exhibits entered at trial. Pet.App. 13.

The Petitioners have failed to acknowledge their own reliance upon the voluminous stipulations of fact and law that was entered in the trial court. It was these stipulations of

fact that constituted the greater part of the conclusive evidence before the trial court and it was these facts that were so vitally important that distinguished this case from those so heavily relied upon by Petitioners.

Argument as to Major Federal Action

The Fifth Circuit Court's decision in this matter is consistent with sound and well settled public policy and is in accord with the pronouncements of law by this Honorable Court. There is no diversity of law between the various circuit courts of this land. The Court of Appeals correctly pointed to the opulent resolution of all evidence derived from the voluminous facts in this case by saying that "[t]he extensive record on appeal, however, fails to show any evidence of any significant federal involvement, much less 'massive' involvement." Pet.App. 12.

The principle, recognized by the appellate court, is that Federal control is the measuring stick by which to judge the imposition of federal guidelines on state projects and to impress upon them the federal requirements of NEPA and other federal statutes. This Court spoke on this subject in *Pennhurst State School and Hospital v. Halderman*, (1981) 101 S.Ct. 1531, 1546, 451 U.S. 1, 67 L.Ed.2d 694. Justice Rehnquist, writing for the majority, said at p. 1546 that "the State [has] alternative choices of assuming the additional cost of complying with federal standards or not using federal funds." Likewise, in the instant case, much like *Pennhurst*, the State chose not to use any federal funds nor, as the appellate court has said, subject the projects to any federal involvement. Pet.App. 17.

The Court of Appeals also correctly recognized that established body of law that holds that NEPA and federal environmental regulations do not apply to state or local actions. *Citizens for Balanced Environ. & Transp., Inc. v. Volpe*, 376 F.Supp. 806 (D.Conn. 1974), aff'd, 503 F.2d 601 (2nd Cir. 1974). Pet. App. 12. This is the catapult, as the appellate court

has proclaimed, that is the launching point for imposing federal criteria on state projects, for without major federal action -- that is federal project -- there can be no consideration of the Petitioners' grievances. 23 C.F.R. 771.9(d)). See *Olivares v. Martin*, 555 F.2d 1192 (5th Cir. 1977); *Sworob v. Harris*, 451 F.Supp. 96(E. D. Pa. 1978), *aff'd*, 578 F.2d 1376 (3rd Cir. 1978), cert. denied, 439 U.S. 1089 (1979). Pet. App. 11-12.

The Court of Appeals has aptly compared and distinguished the factual context of this case to those rules and legal doctrines laid down in instances such as *Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 489-490 (7th Cir. 1977), *aff'd*, 418 F.Supp. 296 (1976), cert. denied, 434 U.S. 1008 (1978), where federal participation in programming, location, design, preliminary engineering, and right-of-way acquisition in a project does often lead to a conclusion that the project might be a "major federal action." However, as conclusively shown in the case before this Court, where all the evidence conclusively showed that no federal funds were used in any part of the project, it is not a proposal for "major Federal action". *Citizens for Balanced Environ. & Transp., Inc.*, 503 F.2d at 602. Pet. App. 13. The Court of Appeals additionally clearly distinguished those cases relied upon by Petitioners, such as *Named Individual Members of San Antonio Conservation Society v. Texas Hwy Dept.*, 496 F.2d 1017, 1022 (5th Cir. 1074), cert. denied, 420 U.S. 926 (1975). Note however that the Court rightfully addressed the significance of the facts of this case in view of the influence of *Hawthorn Environmental Preservation Ass'n v. Coleman*, 417 F.Supp. 1091, 1101 (N.D. Ga. 1976), *aff'd*, 551 F.2d 1055 (5th Cir. 1977), and its lack of application to the facts of this case. Pet. App. 18. The control of the Federal government in a project (or lack of control) was particularly important where an Act of Congress terminated federal funding for freeway construction, and the legal effect was that the project was exempted from the environmental requirements of federal law. *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971) cert.denied, 406 U.S. 933, 92

S.Ct. 1775, 32 L.Ed.2d 136. See also *Macht v. Skinner*, 715 F.Supp. 1131, 1134 (D.D.C. 1989), *aff'd*, 889 F.2d 291 (DC. 1989); *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477 (10th Cir. 1990). Pet App. 18-20. Many of the authorities cited in this Response to Petitioners Application for Writ of Certiorari are circuit court cases in which this Honorable Court has denied certiorari. This application for certiorari should likewise be denied.

The evidence demonstrates, as is noted by the Court of Appeals, that there was no showing of anything other than a possibility of future federal funding. It is settled and accepted by the courts of this land that NEPA's environmental impact statement requirement cannot apply to these state projects, on which no federal action has yet been proposed. *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U. S. 927 (1976); *River v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va. 1973), *aff'd*, 481 F.2d 1288 (4th Cir. 1973). Pet. App. 17.

The ruling of the Fifth Circuit Court of Appeals does not depart from those rules of law established by this Court that have been applied to factual situation such as this case. The appellate court properly held, as a matter of law, that the projects in issue were not Federal projects and not subject to the requirements of NEPA. Petitioners Application for Writ of Certiorari on this point should be denied.

Argument as to Rule 52(a)

The remaining question presented is primarily evidenciary. The substance of the Petitioners' argument is stated in the opinion of the Court of Appeals. The appellate court held

all the stipulations to be relevant.[1] "Pet. App. 4. With the proposition of Petitioner's arguments relative to the stipulations of fact dispensed with, the finding of the trial court then, that the projects were a "proposal for major federal action", was a finding of law which, the Court of Appeals was free to review and reach its own conclusions "untrammeled by the district court's findings and conclusions of law". Pet App. 4. See also, *Wiggington v. Order of United Commercial Travelers of America*, 126 F.2d 659, 661 (7th Cir. 1942); *Fargo Glass & Paint Co. v. Globe American Corp.* 201 F.2d 534, 536, cert. denied 73 S.Ct 833, 345 U.S. 942, 97 L.Ed 1368.

In *Wirtz v. Barnes Grocer Company*, 398 F.2d 718, 722 (8th Cir. 1968) the court dealt with the question of what constitutes a business enterprise under the Fair Labor Standards Act of 1938, 3(r),(s)(1), 29 U.S.C.A. 203(r),(s)(1) and said such is a question of law and the "clearly erroneous" rule does not apply. Likewise, it seems to be a correct application of law that

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[1] "[p]rior to the bench trial, the parties filed a proposed agreed pretrial order containing extensive stipulations of facts. On appeal, a controversy ensued concerning the stipulations. The stipulations on record are divided into three groups; stipulations #1-50, stipulations #61-63, and stipulations #64-299. The appellees assert that the district court did not accept the proposed pretrial order for stipulation #61-299, and thus, the stipulations are largely moot. In essence, according to appellees, this Court need not expend its efforts examining the proposed stipulations. In contrast, the appellants contend that, while the district court did not sign the pretrial order, it was duly filed and entered. Furthermore, the district court's memorandum opinion and order was based on the testimony and evidence presented and upon consideration of the arguments of counsel; that body of record evidence included numerous references to the parties' stipulations. Additionally, throughout the bench trial, the district court permitted counsel freely to refer to the stipulations. At no point before, during, or after the trial did the district court state or imply that it would not accept the stipulations generally or had rejected them specifically. Ultimately, according to appellants, the appellees have demonstrated no good reason to depart from the accepted rule that matters which are stipulated in the pretrial order are binding upon the parties, absent some modification, and usually cannot be pursued on appeal. Our review of the record also indicated that the appellees themselves utilized the same stipulations they asserted should be rendered largely moot. Consequently, this Court has applied all stipulations as relevant."

the question of "proposal for major federal action" is a question of law and not subject to the "clearly erroneous" rule of 52(a). The Court in *Wirtz* said at p. 722:

> Appellees urge that under Rule 52(a) due regard be given to the opportunity of the trial judge to judge the credibility of the witnesses and that we should not set aside findings of fact unless clearly erroneous. This is not the type of situation the rule was intended to cover. Credibility is not in issue. *In issue are the conclusions of law as to what constitutes an enterprise and whether under the undisputed facts, an enterprise as defined by the Act, was shown.* (emphasis added)

As in *Wirtz*, supra, here is an instance where credibility of the witnesses is not in question. It is the interpretation of their testimony that is to be given import. The Court of Appeals is in as good a position as the trial court to determine what law is applicable to the evidence, and if, taken as a whole, whether it constitutes a "proposal for major action" or not. This Court recited what is and should be the rule of this case. In *United States v. United States Gypsum Co.*, (1948) 333 U.S. 364, 68 S.Ct 525, 542, 92 Led. 746, this court said that "[t]he practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The finding is 'clearly erroneous' when although there is evidence to support it, if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". The Fifth Circuit Court of Appeals has followed *United States Gypsum Co.*, supra, reasoning in *Jones v. Diamond*, 394 F.2d 997, 1010, (5th Cir. 1979) by holding that "findings of fact are, of course, to be reviewed under the mandate of Rule 52(a), Federal Rules of Civil Procedure. They are not to be set aside unless clearly erroneous. As this rule has

been construed, *the trial court's findings of fact may be denominated clearly erroneous* only *when the 'reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made*'". (emphases added). The Court of Appeals found error in the trial court's application of the prevalent law by saying, "We recognize that 'major Federal action' can exist when the primary actors are not federal agencies. *Nonetheless, the district court appears to have placed undue reliance on only a portion of the CEQ's regulation by focusing solely on the 'potentially subject' factor while dismissing with seeming facility the "Federal control and responsibility' factor*. (emphasis added). "[T]he distinguishing feature of 'federal involvement' is the ability to influence or control the outcome in material respects." Pet App. 20. The trial court missed completely the correct import of this regulatory provision. It was not error for the appellate court to review the entire record and form a definite and firm conviction that a mistake had been committed. Pet. App. 15, 20.

Finally, the Petitioners reliance on *Pullman-Standard v. Swint*, 102 S.Ct. 1781, 456 U.S. 273, 72 L.Ed.2d 66 (1982) is incorrect because the appellate court applied the correct law to the totality of facts in this case. *Pullman-Standard* is a correct restatement of the "clearly erroneous" rule of 52(a), however, the trial court in the present case did not correctly apply the prevailing law applicable to the factual context of the case before it. Pet. App. 11, 32. Consequently, the ruling of the Fifth Circuit Court of Appeals in this case does no violence to Rule 52(a) but is a correct application of the prevailing law to the totality of facts developed in the trial court. Here, as in *United States v. United States Gypsum Co.*, supra, the appellate court has merely concluded that the law applied to the factual findings of the trial court was clearly wrong because, in reviewing this matter on the entire evidence, the Court obviously was left with the definite and firm conviction that a mistake had been committed. Id. at p. 542. e.g. Pet. App. 32.

This Court has repeatedly held that its job is not to correct factual errors committed in courts below. This Court denied certiorari in *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie, Etc.*, 663 F.2d 1338, 1341 (5th Cir. 1981) cert. denied 102 S.Ct. 1104, in an instance where the Court noted at p. 1431 that: "[i]n our review of the District Court's judgment, we are bound under F.R.Civ.P. 52(a) to accept its findings of fact unless 'clearly erroneous". See 5A *Moore's Federal Practice* Sec. 52.08. "Findings are 'clearly erroneous' in this Circuit where such findings are without substantial evidence to support them, where the District Court misapprehended the effect of the evidence, and if the force and effect of testimony considered as a whole disclosed that the finding is so against the great preponderance of the credible testimony that it does not reflect the truth of the case." (citations omitted). There is no underlying justification for this Court to expend any fruitless effort by granting certiorari in this case based upon Petitioner's argument that the appellate court, in some way, violated the spirit or meaning of F.R.Civ.P Rule 52(a).

CONCLUSIONS

This case does not merit review by this Honorable Court by way of Certiorari. There are no novel procedural or constitutional questions presented here nor is there any aberrance of law between the circuit courts of this country; only the clear, concise and declarative principles enunciated by the wisdom of the courts of our land. This Respondent moves the Court to deny the Application for Writ of Certiorari presented by Petitioners in this matter.

Respectively submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response of the Texas Department of Transportation was served in compliance with Rule 5 of the Federal Rules of Civil Procedure by certified mail, return receipt requested on this the 29 day of April, 1992.

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